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Public Prosecutor v Ribin bin Osman

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05(H)-189–07 OF 2015
DAVID WONG, ABANG ISKANDAR AND ZAMANI A RAHIM JJCA
11 JANUARY 2017

C

Criminal Law — Appeal — Appeal against sentence — Respondent pleaded guilty to alternative charge of culpable homicide under s 304(a) of the Penal Code — Respondent convicted and sentenced to 12 years imprisonment — Whether sentence imposed on respondent manifestly inadequate — Whether trial judge failed to consider sentencing trend — Penal Code s 304(a)

D

The respondent pleaded guilty to an alternative charge of culpable homicide ('the said offence') under s 304(a) of the Penal Code tendered by the prosecution. Consequently, the respondent was convicted of the said offence and sentenced to 12 years imprisonment with effect from the date of arrest. Aggrieved by the sentence imposed on the respondent, the prosecution filed the present appeal. In essence, the prosecution submitted that the sentence was manifestly inadequate. Further, the prosecution also submitted that, the learned trial judge, while considering public interest in his judgment, had in actual fact failed to reflect such concern. It was also submitted that the learned trial judge had failed to consider the sentencing trend before imposing the sentence.

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Held, dismissing the appeal and affirming the sentence of 12 years imposed by the High Court judge:

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(1) Sentencing in criminal cases is a matter of judicial discretion of the trial court. The court was guided by the observation of Raja Azlan Shah, AG LP (as His Royal Highness then was) in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 ('Bhandulananda'). Based on the facts and circumstances of the case, the sentence imposed by the learned trial judge may appear to be on the lenient side, but that did not mean that the trial judge was plainly wrong. In imposing such sentence, His Lordship was still within the ambit of his judicial discretion as envisaged in the case of *Bhandulananda* (see paras 18 & 21).

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[Bahasa Malaysia summary

Responden mengaku bersalah kepada tuduhan alternatif homisid salah ('kesalahan tersebut') di bawah s 304(a) Kanun Keseksaan yang dikemukakan oleh pihak pendakwaan. Akibatnya, responden disabitkan dengan kesalahan

tersebut dan dijatuhkan hukuman penjara 12 tahun berkuat kuasa dari tarikh penangkapan. Tidak berpuas hati dengan hukuman yang dikenakan ke atas responden, pihak pendakwaan memfailkan rayuan ini. Pada dasarnya, pihak pendakwaan juga berhujah bahawa hukuman jelas tidak memadai. Selanjutnya, pihak pendakwaan juga berhujah bahawa, hakim perbicaraan yang bijaksana, semasa mempertimbangkan kepentingan awam dalam penghukumannya, telah sebenarnya gagal untuk membayangkan kebimbangan tersebut. Ia juga dihujahkan bahawa hakim perbicaraan yang bijaksana telah gagal untuk mempertimbangkan trend hukuman sebelum mengenakan hukuman tersebut.

Diputuskan, menolak rayuan dan mengesahkan hukuman 12 tahun yang dikenakan oleh hakim Mahkamah Tinggi:

(1) Hukuman di dalam kes jenayah adalah perkara budi bicara kehakiman mahkamah perbicaraan tersebut. Mahkamah dibimbing oleh pemerhatian Raja Azlan Shah, Pemangku LP (Baginda pada ketika itu) dalam kes *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 ('Bhandulananda'). Berdasarkan fakta dan keadaan kes, hukuman yang dikenakan oleh hakim perbicaraan mungkin nampak sebagai lebih ringan, tetapi tidak bermaksud bahawa hakim perbicaraan jelas salah. Dalam mengenakan hukuman sedemikian, Baginda masih dalam skop budi bicara kehakimannya seperti yang ditetapkan dalam kes *Bhandulananda* (see paras 18 & 21).]

Notes

For cases on appeal against sentence, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 84–88.

Cases referred to

Abu Bakar bin Alif v R [1953] 1 MLJ 19 (refd)
Azwel bin Mohd Ali lwn Pendakwa Raya [2013] 1 MLJ 253; [2012] 6 CLJ 809, CA (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (folld)
Jayaraman & Ors v PP [1982] 2 MLJ 273 (refd)
Kammon Wanga & 1 v PP R-05–93 of 2008 (unreported), CA (refd)
Kesavan a/l Baskaran v PP [2008] 6 MLJ 384; [2008] 6 CLJ 390, CA (refd)
Pendakwa Raya lwn Ramakrishnan a/l Subramaniam dan lain-lain [2013] 2 MLJ 549; 2012 CLJ 443, CA (refd)
PP v Amil bin Mohd Shah N-05–46 of 2010 (unreported), CA (refd)
PP v Beiti binti Abdul Sawab S-05–275 of 2010 (unreported) (refd)
PP v Kanadasan a/l Sankaran & Anor [2010] 1 MLJ 297; [2010] 1 CLJ 596, CA (refd)
PP v Karthiselvam a/l Vengatan [2011] 4 MLJ 212; [2009] 4 CLJ 632, CA (refd)

PP v Loo Choon Fatt [1976] 2 MLJ 256; [1976] 1 LNS 102 (refd)
PP v Nagalingam a/l S Fathinathan [2009] MLJU 356, HC (refd)
PP v Omar bin Rudding [2017] 3 MLJ 524, CA (refd)
PP v Tegoh bin Aling [2008] 8 MLJ 705, HC (refd)

Legislation referred to

Penal Code ss 34, 302, 304(a), (b)

Appeal from: Criminal Trial No TW2–45B-2/3 of 2014 (High Court, Tawau)

Adam bin Mohamed (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Liew Hon Min (Liew Hon Min & Co) for the respondent.

Zamani A Rahim JCA:

INTRODUCTION

[1] The respondent was originally charged with an offence of murder under s 302 of the Penal Code. After calling four witnesses, the prosecution on 15 June 2015 tendered an alternative charge against the respondent under s 304(a) of the Penal Code. The charge reads:

Alternative Charge

> Bahawa kamu pada 27.9.2012, jam lebih kurang 12 tengahari di Kampung Ubi, Jalan Dam, di dalam Daerah Lahad Datu, dalam Negeri Sabah telah menyebabkan kematian Saleh Khan (warganegara Pakistan) dengan niat menyebabkan kecederaan tubuh badan yang mungkin menyebabkan kematiannya, dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah seksyen 304(a) Kanun Keseksaan.

[2] The charge was read and explained to the respondent. He pleaded guilty to the charge and he understood the charge and the nature and consequences of his plea.

STATEMENT OF FACTS AND SENTENCE

[3] The prosecution then tendered the statement of facts. It is reproduced below:

Facts of case

(1) Pada 27.9.2012 telah terjadi pergaduhan di antara Ribin bin Osman, Orang Kena Tuduh (OKT) dalam kes ini dengan isterinya bernama Hamisah binti Gari. Ini kerana OKT mendapat tahu bahawa isterinya telah mengadakan hubungan sex dengan Saleh Khan iaitu simati dalam

kes ini. Isteri OKT menyatakan dia dipaksa oleh simati kerana gagal membayar ansuran bulanan sebanyak RM200.00 bagi pembelian speaker dan televisyen daripada simati.

(2) Untuk mengesahkan perkara ini OKT telah menyuruh isterinya menghubungi simati dan memberitahu untuk datang ke rumahnya bagi tujuan mengadakan hubungan sex sebagai ganti bayaran bulanan tersebut. Tapi kali ini OKT meminta isterinya memberitahu simati agar hubungan sex dibuat di luar rumah.

(3) Lebih kurang jam 12.00 tengahari pada 27.9.2012, simati telah datang ke satu kawasan Ladang Kelapa Sawit berhampiran rumah OKT bersama satu karung guni warna putih dan tangan kirinya kemudian menarik tangan isteri OKT. OKT telah bersedia bersembunyi bersama sebilah pedang samurai di situ.

(4) Apabila sampai disitu, simati telah menghampar karung guni tersebut, membuka seluarnya dan membuka seluar isteri OKT. Kemudian simati telah mengadakan hubungan sex dengan isteri OKT. Pada masa inilah OKT keluar dari persembunyian dan terus menikam di bahagian perut simati. Kemudian OKT melibas ke bahagian perut simati. Kemudian simati meluru ke arah OKT, pada masa ini OKT melibas ke bahagian dada simati dan melibas sekali lagi ke bahagian leher kiri simati, kemudiannya simati terjatuh disitu.

(5) Kemudian OKT mengarahkan isterinya menutup tubuh simati menggunakan daun kelapa kering. Kemudian OKT dan isterinya balik ke rumah mereka.

(6) OKT kemudian mengambil pakaian dan melarikan diri, namun berjaya ditangkap oleh pihak polis pada 11.10.2012.

(7) Siasatan dijalankan oleh Inspektor Mohamad Soffi bin Jalal daripada Jabatan Siasatan Jenayah IPD Lahad Datu.

(8) Laporan polis berkaitan kes ini ialah Lahad Datu Report: 6985/12.

(9) Siasatan mendapati tempat kejadian ialah di Batu 4, Jalan Dam, Kampung Ubi, Lahad Datu, Sabah. Simati bernama Saleh Khan @ Karim Shah berumur 30 tahun berbangsa Pakistan.

(10) OKT bernama Ribin bin Osman, berumur 35 tahun, berbangsa Suluk dan berasal daripada Bungau, Filipina.

(11) Laporan post-mortem menyatakan terdapat tiga kesan tetakan (dada, perut dan peha) dan empat kesan tikaman (dada dan belakang badan). Punca kematian ialah *Thoracic Injuries Due To Multiple Slash Wounds*.

(12) OKT kemudiannya telah menunjukkan kepada pihak polis sebilah pedang samurai yang digunakan dalam kejadian ini.

(13) Oleh yang demikian, OKT didapati bersalah sebagaimana pertuduhan pilihan.

[4] The respondent admitted the facts as correct. The statement of facts was marked as exh P9. The learned deputy then tendered the following exhibits namely:

List of exhibits:

1.	Photographs of the post-mortem	–	P2(1)–(18)
2.	Photographs of the exhibits	–	P3(1)–(4)
3.	A post-mortem report	–	P5
4.	Kota Kinabatangan Report No 2219/12	–	P10
5.	Sketch plan and key A	–	P11A and P11K
6.	Sketch plan and key B	–	P12 and P12K
7.	Photographs of the scene of crime	–	P13
8.	A samurai sword	–	P13A

[5] Having accepted the respondent's plea of guilty, he was convicted under the alternative charge of culpable homicide nor amounting to murder under s 304(a) of the Penal Code which carries an imprisonment term of 30 years.

[6] Upon mitigation, the respondent was sentenced to 12 years of imprisonment term with effect from the date of his arrest.

[7] Dissatisfied with the sentence imposed on the respondent, hence this appeal.

THE APPEAL

[8] There are four grounds of appeal listed by the prosecution in its petition of appeal filed on 25 August 2016. They are as follows:

1. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila menjatuhkan hukuman 12 tahun penjara dari tarikh tangkap terhadap responden bagi 1 pertuduhan pilihan yang boleh dihukum di bawah seksyen 304(a) Kanun Keseksaan sedangkan hukuman tersebut adalah terlalu tidak mencukupi (*manifestly inadequate*).

2. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila gagal untuk mengambilkira tren hukuman semasa sebelum menjatuhkan hukuman ke atas responden.

3. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila walaupun mengambilkira factor kepentingan awam, keseriusan kesalahan dan kejadian tersebut dirancang rapi oleh responden, telah gagal untuk mencerminkannya di dalam hukuman yang dijatuhkan.

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4. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila terlalu memberi keberatan kepada faktor pengakuan bersalah yang menjimatkan masa semua pihak, faktor peribadi responden dan kesalahan tersebut merupakian kesalahan pertama responden, sedangkan kesalahan tersebut adalah satu kesalahan yang serius yang mengatasi ke semua faktor-faktor tersebut.

B

[9] Essentially the prosecution is unhappy with the sentence of 12 years imprisonment which runs from the date of arrest. The sentence is said to be manifestly inadequate.

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SUBMISSION BY THE LEARNED DEPUTY

[10] The learned deputy's submission before us runs as follows. Firstly, the maximum sentence provided by law is 30 years of imprisonment and fine: see s 304(b) of the Penal Code and s 6 of the Penal Code (Amendment) Act 2003 ('Act A1210'). The amendment passed by the parliament clearly show that the enhancement of the maximum sentence is to be served as a deterrent factor.

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[11] The learned trial judge, while considering public interest in his judgment, has in actual fact failed to reflect such concern. In his judgment at p 10, para 55, *rekod rayuan jenayah Jld* 1:

> In passing sentence, I have considered the need to consider public interest by imposing a sentence that not only would punish the accused but also to deter other would be offender from committing the same offence ...

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The main sentencing principle in all cases is that the public consideration shall be given priority over that of the individual person: see *Abu Bakar bin Alif v R* [1953] 1 MLJ 19.

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[12] Further, this court in the case of *Azwel bin Mohd Ali lwn Pendakwa Raya* [2013] 1 MLJ 253; [2012] 6 CLJ 809 said that:

> Mahkamah Tinggi dan juga mahkamah ini telah mengambil kira bahawa di dalam kes ini terdapat isu kepentingan awam (*public interest*) dan juga isu kepentingan peribadi perayu yang perlu dipertimbangkan sebelum hukuman dikenakan. Walau bagaimanapun Mahkamah Tinggi dan juga mahkamah ini telah memakai prinsip bahawa kepentingan awam mengatasi kepentingan peribadi.

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[13] Based on the fact, the trial judge also said that a severe sentence should be imposed on the respondent but the sentence imposed was inadequate. The trial judge merely paid lip service.

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[14] The prosecution also invited this court to give emphasis to the admitted facts as follows:

(a) it was a premeditated offence — the respondent instructed his wife to call the deceased and to have sex with the wife on the pretext and shrewd plan 'in lieu of the payment of monthly instalment'. While the wife was having sex with the deceased, the respondent was hiding, watching the sexual intercourse took place, executed the heinous killing and together with his wife, they covered up the dead body of the deceased with coconut leaves;

(b) the weapon used in the killing was a samurai sword; and

(c) the injury suffered by the deceased — seven injuries (slash/stab) on his abdomen, chest, back and left thigh. SP2 testified that the weapon used must be so sharp and long because the injuries inflicted upon the deceased was so deep that it penetrated from the back to the front body.

[15] There was an over reliance by the learned trial judge with the respondent's mitigation factors rather than the public interest factor. In the case of *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; [1976] 1 LNS 102, Hashim Yeop Sani J, held that:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment in Hilbery J in *Rex v Kenneth John Ball* as follows: In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest ...

[16] Finally, the learned trial judge had failed to consider the sentencing trend before imposing the sentence. In pleading guilty cases, the trend for this type of offence would be an imprisonment term between 15–20 years.

REPLY BY THE RESPONDENT

[17] Before he began his reply, learned counsel informed the court that he was providing the service on pro bono basis:

(a) the respondent had pleaded guilty to the charge, thus saving the court's time, the witnesses time and the cost;

(b) the respondent had clean record and had repented;

(c) the manner the crime was committed was heinous. The deceased was the author of his death. The deceased was attacked while in the midst of having sexual intercourse with the respondent's wife;

(d) the deceased's conduct was also blameworthy. He took advantage of a poor family who could not pay the monthly instalment in respect of goods taken on credit;

(e) the cases referred by the respondent were as follows:

(i) *Public Prosecutor v Tegoh bin Aling* [2008] 8 MLJ 705:

– an offence under s 304(a) of the Penal Code; and

– pleaded guilty, the sentence was 12 years imprisonment;

(ii) *Public Prosecutor v Nagalingam a/l S Fathinathan* [2009] MLJU 356:

– the accused pleaded guilty to an amended charge of s 304(a) of the Penal Code; and

– he was sentenced to 13 years imprisonment.

OUR DECISION

[18] This case was heard on the same day as the case in *Public Prosecutor v Omar bin Rudding* [2017] 3 MLJ 524. As we have stated in *Omar bin Rudding*, sentencing in criminal cases is a matter of judicial discretion of the trial court. We are guided by the observation of Raja Azlan Shah Ag LP (as His Royal Highness then was) in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 is as follows:

> It is sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson*). It is for that reason that some very conscientious judges have thought it their duty to visit particulars crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to a view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.

[19] The trend of sentencing in other pleading guilty cases for similar offences under s 304(a) are as follows:

Section 304(a) of the Penal Code

Plead Guilty

Case	Facts	Sentence	Date of offence
Public Prosecutor v Kanadasan a/l Sankaran & Anor [2010] 1 MLJ 297; [2010] 1 CLJ 596	PG to alternative charge s 304(a). Slashed the deceased on his face and neck whilst deceased was asleep.	Enhanced from 10 years to 17 years by COA	6 September 2001
Kesavan a/l Baskaran v Public Prosecutor [2008] 6 MLJ 384; [2008] 6 CLJ 390	PG to alternative charge s 304(a). Appellant enlisted assistance of two other accused to commit the crime. The deceased savagely beaten then tied up and placed in a sack and thrown into a pond.	From 14 years enhanced to 18 years by COA	2003
Public Prosecutor v Karthiselvam a/l Vengatan [2011] 4 MLJ 212; [2009] 4 CLJ 632	PG to alternative charge s 304(a). Smashed the deceased's head with a grinding stone whilst the latter was asleep because afraid that deceased would discover the theft.	Enhanced from 13 years to 20 years by COA	2007
Public Prosecutor v Beiti binti Abdul Sawab S-05–275 of 2010, 15 March 2012	PG to alternative charge. There was a provocation from the deceased to the R where the deceased had said 'dayus' to him R had stabbed seven times at the chest and back of the deceased. The cause of death of the deceased was 'hemorrhagic due to stab wounds'.	From 10 years imprisonment was enhanced to 15 years	16 October 2007

Pendakwa Raya lwn Ramakrishnan a/l Subramaniam dan lain-lain [2013] 2 MLJ 549; [2012] 9 CLJ 443	PG to alternative charge s 304(a). Deceased was tied up and savagely beaten by the appellants using hands, woods and belt. Since the deceased had refused to answer the question put by R3, R3 then used a parang to hit the deceased's head. The next day he was brought to a jungle area and again was beaten by the appellants. He was left alone.	From 13 years (for R3) and 11 years (for R1, R2, R4, R5) enhanced to 18 years (for R3) and 15 years (for R1, R2, R4, R5)	26 April 2007
Public Prosecutor v Amil bin Mohd Shah N-05–46 of 2010, 19 May 2011	COA increased sentence given by HC (12 years). The respondent killed her girlfriend because she wanted to end up their relationship.	15 years imprisonment	
Kammon Wanga & 1 v Public Prosecutor R-05–93 of 2008, 8 March 2011	Appellants originally charged under s 302 of the PC read with s 34 of the PC. COA increased sentence given by HC which is eight years six months for the first respondent and 8 years for the second respondent.	15 years (first appellant), 13 years (second appellant)	

[20] Having examined the recent cases of pleading guilty in respect of offences under s 304(a) of the Penal Code, we agreed with the learned deputy that the custodial sentences for offence of this nature would range from 15 years to 20 years.

[21] Having regard to the facts and circumstances of this case, the trial judge had sentenced the respondent to 12 years imprisonment wef the date of arrest. We found that the sentence imposed may appear to be on the lenient side, but that did not mean that the trial judge was plainly wrong. In imposing such sentence as he did, His Lordship was still within the ambit of his judicial

discretion as envisaged in *Bhandulananda Jayatilake*. It may also be recalled the words of Syed Othman FCJ in the Federal Court case of *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 273 where His Lordship in the last paragraph of his judgment said at p 283 as follows:

> As to the cross-appeal against sentence, I agree that the sentences imposed by the learned President are on the lenient side. If I had heard the case, I would have imposed heavy sentences. But again the learned President had the advantage of hearing and considering the full circumstances of the case. In the special circumstances of this case, I would not disturb the sentences.
>
> Appeal and cross-appeal dismissed.

CONCLUSION

[22] In conclusion, we had therefore dismiss the appeal by the prosecution and we affirm the sentence of 12 years imposed by the High Court judge.

Appeal dismissed; sentence of 12 years imposed by High Court judge affirmed.

Reported by Dzulqarnain Ab Fatar